

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:NED:BOS:TL-N-3568-01
BJLaterman

date: JUL 10 2001

to: Diane LaCourse, Technical Support Reviewer - Area One
LMSB SB/SE Compliance-Technical Support E:PPO2MB: D. LaCourse STOP 41175
att: Team Manager, Team 1322,
from: Associate Area Counsel, Boston
CC:LM:FSH:BOS

subject:

Forms 872
Taxable Years [REDACTED] through [REDACTED]
Statute of Limitations: [REDACTED]

This memorandum responds to your request of May 29, 2001, that we give advice regarding extending the statute of limitations for the above-mentioned consolidated group's taxable years [REDACTED] through [REDACTED]. This memorandum should not be cited as precedent.

[REDACTED] was a Delaware corporation which was the parent corporation of an affiliated group of corporations. [REDACTED] is a Delaware corporation which was a wholly owned subsidiary of [REDACTED]. [REDACTED] and its wholly owned subsidiaries filed on a consolidated basis for their [REDACTED], and [REDACTED] taxable years and for the taxable year ended [REDACTED].

On [REDACTED], [REDACTED] and [REDACTED] entered into an Agreement of Merger. The Agreement provided that [REDACTED] would be merged into [REDACTED] with [REDACTED] the surviving corporation. All the stock of [REDACTED] would be exchanged for [REDACTED] stock. The merger occurred on [REDACTED].

[REDACTED] is a Delaware corporation. On [REDACTED], [REDACTED] acquired all the issued and outstanding stock of [REDACTED]. [REDACTED] became a wholly owned subsidiary of [REDACTED] and began

filing as a member of the [REDACTED] consolidated group. [REDACTED] has informed the undersigned that [REDACTED] is still in existence with the same EIN as it had while a member of the [REDACTED] consolidated group.

The [REDACTED] return for the taxable year ended [REDACTED] was filed on [REDACTED]. Said return which included the operations of [REDACTED] and the other subsidiaries showed a net operating loss. Pursuant to an Application for Tentative Refund (Form 1139), the net operating loss was carried back to the [REDACTED] and [REDACTED] taxable years. The statutes for the returns filed for the [REDACTED] and [REDACTED] taxable years and the taxable year ended [REDACTED] expired/expire on [REDACTED], [REDACTED] and [REDACTED], respectively.

Generally, the common parent, with certain exceptions not applicable here, is the sole agent for each member of the group, duly authorized to act in its own name in all matters related to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent in its name will give waivers, and any waiver so given, shall be considered as having also been given or executed by each subsidiary. Treas. Reg. § 1.1502-77(a). Thus, generally the common parent is the proper party to sign consents, including the Form 872 waiver to extend the period of limitations, for all members in the group. Treas. Reg. § 1.1502-77(a). Treas. Reg. § 1.1502-77(c) provides that, unless the District Director agrees to the contrary, an agreement entered into by the common parent extending the time within which an assessment may be made in respect to the tax for a consolidated return year, shall be applicable to each corporation which was a member of the group during any part of such taxable year. The common parent and each subsidiary which was a member of the consolidated group during any part of the consolidated return year is severally liable for the tax for such year. Treas. Reg. § 1.1502-6(a).

Temp. Reg. § 1.1502-77T provides exceptions to the general rule. Temp. Reg. § 1.1502-77T provides for alternative agents in certain circumstances and applies to waivers of the statute of limitations for taxable years for which the due date (without extensions) of the consolidated return is after September 7, 1988. Therefore, the regulation is applicable in this case. Temp. Reg. § 1.1502-77T provides that a waiver of the statute of

¹It is noted that the return for the year ended [REDACTED] was filed by [REDACTED] which was merged into [REDACTED] on [REDACTED].

limitations with respect to the consolidated group given by any one or more corporations referred to in paragraph (a)(4) of the section is deemed to be given by the agent of the group.

Subparagraph (a)(4)(i) lists as an alternative agent the common parent of the group for all or any part of the year to which the notice or waiver applies. In this case, the common parent, [REDACTED], was merged into [REDACTED] on [REDACTED] and is no longer in existence. Therefore, this paragraph does not apply.

Subparagraph (a)(4)(ii) lists as an alternative agent a successor to the former common parent in a transaction in which I.R.C. § 381(a) applies. I.R.C. § 381(a) applies, in part, to an acquisition of assets of a corporation by another corporation in a transfer to which I.R.C. § 361 (relating to non recognition of gain or loss to corporations) applies, but only if the transfer is in connection with a reorganization described in subparagraph (A), (C), (D), (F) or (G) of I.R.C. § 368(a)(1). On [REDACTED], [REDACTED] merged into [REDACTED], with [REDACTED] surviving. If the merger is an "A" reorganization, I.R.C. § 381 will apply to the merger. If so, pursuant to Temp. Reg. § 1.1502-77T(4)(ii), [REDACTED], would be an alternative agent for the [REDACTED] consolidated group for the tax years [REDACTED] and [REDACTED] and the taxable year ended [REDACTED].

Any waiver given by [REDACTED] with respect to those pre-merger years of the [REDACTED] consolidated group would be deemed to be given by the agent of the group. Therefore, you should confirm that the downstream merger of [REDACTED] into [REDACTED] is a transaction to which I.R.C. §381 applied.

Both [REDACTED] and [REDACTED] are Delaware corporations. In this case since the merger was effected under Delaware law, [REDACTED] is primarily liable for [REDACTED] debts, including taxes due. Southern Pacific Transportation Co. v. Commissioner, 84 T.C. 387 (1985), later proceeding, 90 T.C. 771 (1988). Section 259 of the Delaware General Corporation Law provides in part,

(a) When any merger or consolidation shall become effective under this chapter, ... all rights of creditors and all liens upon any property of any of said constituent corporations shall be preserved unimpaired, and all debts, liabilities and duties of the

respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

DEL. CODE ANN. tit. 8, § 259 (1991).

Accordingly, [REDACTED] is a successor in interest by merger to [REDACTED].

Based on the foregoing discussion, we recommend that you obtain a Form 872 from [REDACTED]. We recommend that the caption on the Form 872 read: [REDACTED] (EIN) as agent for the [REDACTED] (E.I.N.) consolidated group.* On the bottom of the form, you should add the following: *This is with respect to the consolidated tax of the [REDACTED] / [REDACTED] consolidated group for its taxable years ending [REDACTED] and [REDACTED].

This Form should be signed by an authorized officer or director of [REDACTED]. Rev. Rul. 83-41, 1983 C.B. 399, clarified and amplified by, Rev. Rul. 84-165, 1984-2 C.B. 305.

In addition, under I.R.C. § 6901, [REDACTED] is a transferee at law of [REDACTED] because [REDACTED] received the assets of [REDACTED] when [REDACTED] merged into [REDACTED]. A determination against the surviving corporation for tax due by the merged corporation for a period prior to the merger is not generally handled as a transferee case, rather it should generally be handled by asserting primary liability against the surviving corporation. There is an exception if the statutory period for assessing a deficiency has expired under primary liability; the Service would then argue that the surviving corporation should be liable as a transferee. See generally CCDM (35)(10)61. Therefore, it is preferable to assert primary instead of transferee liability against the surviving corporation, [REDACTED], if the statutory period for assessing a deficiency has not expired under primary liability. The transferee liability approach should be reserved for the situation where time for asserting primary liability has expired. Since the statute for [REDACTED] expired on [REDACTED], it would be appropriate to use the transferee liability approach in the event that there is a possibility that the liability for [REDACTED] could exceed the amount

of the tentative allowance for the [REDACTED] taxable year. If that is not the case, I.R.C. §6501(k) provides that the statute for the loss year ([REDACTED]) controls for [REDACTED] to the extent of the tentative allowance.

If you decide to utilize the transferee approach for [REDACTED] the Form 977 (Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift and Estate Tax Against a Transferee or Fiduciary) and the Form 2045 (Transferee Agreement) should be secured from [REDACTED].

If we can be of any further assistance, the undersigned can be reached at (617) 565-7838.


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